

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBERT W. BREWER and
ZETHA BREWER, Husband and Wife

PLAINTIFFS

V.

CIVIL ACTION NO. 2:99CV-134-B-B

ROBINSON PROPERTY GROUP, L.P.,
d/b/a HORSESHOE CASINO & HOTEL,
HORSESHOE GP, INC., HORSESHOE
GAMING, L.L.C., AND JOHN DOES 1-10

DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the defendant, Horseshoe Gaming, L.L.C.'s, motion to dismiss. Upon due consideration of the party's memorandum and exhibits, the court is ready to rule.

FACTS

Robinson Property Group, L. P., does business as the Horseshoe Casino & Hotel, and the plaintiffs bring this cause based on an incident which purportedly occurred at the Horseshoe Casino & Hotel. Horseshoe GP, Inc. is the general partner of Robinson Property Group, L.P., and Horseshoe Gaming, L.L.C. is the limited partner. On November 20, 1996, the plaintiffs were playing slot machines at the Horseshoe Casino in Robinsonville, Mississippi. In the complaint, the plaintiffs allege that employees of the casino tied a money cart to a wall and left it in the aisle carelessly blocking foot traffic. As plaintiff Robert Brewer turned from the slot machine he was playing, he fell over the money cart in the aisle and sustained injuries. The defendant, Horseshoe Gaming, L.L.C., brings this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The plaintiffs have not filed a response to this motion.

LAW

A motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure is generally disfavored and is rarely granted. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir.1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir.1981). In deciding a motion to dismiss under Rule 12, the

district court accepts as true the well-pleaded factual allegations contained in the plaintiff's complaint. C.C. Port, Ltd. v. Davis-Penn Mortgage Co., 61 F.3d 288, 289 (5th Cir.1995). "Taking the facts alleged in the complaint as true, if it appears certain that the plaintiff cannot prove any set of facts that would entitle it to the relief it seeks," dismissal is proper. C.C. Port, 61 F.3d at 289. It must appear beyond any doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir.1995). Even if it appears an almost certainty that the facts as alleged in the complaint cannot be proved to support the claim, the complaint cannot be dismissed so long as a claim is stated. Boudeloche v. Grow Chem. Coatings Corp., 728 F.2d 759, 762 (5th Cir.1984). If a required element, a prerequisite to obtaining the requested relief, is lacking in the complaint, dismissal is proper, and "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir.1995).

While dismissal under Rule 12(b)(6) ordinarily is determined by whether the facts alleged, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. Clark, 794 F.2d at 970; Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir.), cert. denied, 459 U.S. 1105, 103 S. Ct. 729, 74 L. Ed. 2d 953 (1983). This type of dismissal is not widely favored because it precludes consideration of the merits of plaintiff's claim. See Moch v. East Baton Rouge Parish Sch. Bd., 548 F.2d 594, 596 n. 3 (5th Cir.), cert. denied, 434 U.S. 859, 98 S. Ct. 183, 54 L. Ed. 2d 132 (1977).

Under Mississippi law, liability of partnerships to third parties includes the following:

A limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business. However, if the limited partner participates in the control of the business, he is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.

MISS. CODE ANN. § 79-14-303. The plaintiffs' complaint fails to indicate the extent of the defendant, Horseshoe Gaming, L.L.C.'s, involvement in the operation of the Horseshoe Casino & Hotel. The

only contentions the plaintiffs make include the facts that Horseshoe Gaming, L.L.C. is a Delaware limited liability company with its principal place of business in Nevada and that it is the limited partner of Robinson Property Group, L.P. It is further noted by the court that there was no response by the plaintiffs to this motion to dismiss. Accordingly, the court finds that this cause should be dismissed as to the defendant, Horseshoe Gaming, L.L.C., because the plaintiffs have failed to state a claim in their complaint upon which relief can be granted.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion to dismiss should be granted. An order will issue accordingly.

THIS, the ____ day of December, 1999.

NEAL B. BIGGERS, JR.
CHIEF JUDGE